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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09-934,394	08/21/2001	Charles Gambino	67,500-536	8127

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EXAMINER

TRAN LIEN, THUY

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 08/14/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/934,394

Applicant(s)

Gambino et al

Examiner

Lien Tran

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on Aug 21, 2001
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-53 is/are pending in the application.
- 4a) Of the above, claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-53 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claims _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
*See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s). 3 6) ☐ Other: _____

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1. Claims 1-53 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claim 1: Lines 9-10, what does applicant mean by "positive water content"?

In claim 4, does applicant intend for a Markush group; if so, the proper language is "selected from the group consisting of".

Claim 6 has the same problem as claim 4. Additionally, claim 6 is vague and indefinite in that some of the filling materials are repeated. For example, line 2 recites, cheese, tomato, tomato and herbs, tomato sauce and the same materials are recited on lines 3 and 4. It is not clear what is intended.

Claims 8-10, 12-23 have the same problem as claim 4.

Claims 25-26 have the same problem as claim 1.

Claims 29-31, 34-48 have the same problem as claim 4.

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459

(1966), that are applied for establishing a background for determining obviousness under 35

U.S.C. 103(a) are summarized as follows:

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1. Determining the scope and contents of the prior art.
 2. Ascertaining the differences between the prior art and the claims at issue.
 3. Resolving the level of ordinary skill in the pertinent art.
 4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
4. Claims 1-53 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bauman et al in view of Herting.

Bauman et al disclose a fully baked or fried multi-layered toaster product. The product comprises a first layer, a second layer and a filling in between of the two layers. The second layer can be a batter-type product such as waffle batter, pancake batter. The filling layer can be of any flavor, sweetness, texture or color such as described on column 3 lines 45-56. The toaster product can be stored, distributed and sold in shelf stable refrigerated or frozen format.

Bauman et al do not disclose the water activity of the waffle layer and the filling, the formulations for the filling and waffle as claimed.

Herting discloses in the background section a typical formulation for waffle batter comprising water, 38.93% wheat flour, .78% soy flour, .51% sugar, .30% lecithin, .16% baking soda, .08% salt and .78% peanut oil. (See column 1 lines 40-50)

The claims as written do not exclude the first layer of the Bauman et al product to be a non-waffle layer. Bauman et al disclose the second layer can be a waffle layer and this layer surround the filling which is located between the first and second layers. When the second layer is

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a waffle layer, it will obviously have the same water activity as claimed because it is the same type of product. As to the water activity of the filling, it would have been obvious to one skilled in the art to formulate the filling to have a lower water content and therefore a lower water activity than the outer waffle layer so as to prevent moisture migration from the filling to the outer layer during storage. The specific water content depends on the type of filling and it would have been obvious to one skill in the art to formulate the filling to be compatible with the outer layer to obtain shelf stability; this can be readily determined by one skilled in the art. As to the specific filling compositions claimed, it would have been obvious to one skilled in the art to make any filling composition in accordance to the flavor and taste wanted. Bauman et al disclose the filling layer can be of any flavor, sweetness, texture or color. As to the inclusion of the leavening acid and bicarbonate in the waffle batter, this is well known in the art. A typical recipe for waffle batter includes egg, milk, oil, flour, baking powder, sugar and salt. Variation from the basic recipe is obvious depending on the type of waffle and the flavor desired. The use of baking powder is equivalent to the use of bicarbonate and leavening acid. It would also have been obvious to add nutritional supplement to the waffle or filling or both when it is desired to enhance the nutrition of the product. This is well known in the art as many food products such as cereal bar, juice, bread etc. are fortified with nutritional supplements such as vitamins, iron, calcium etc... It would also have been obvious to select any known fat, sugar, emulsifier, protein, gum, leavening acid; this is a matter of preference. The additional of all these ingredients to the waffle and the filling would have been obvious to obtain specific taste, texture and flavor.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien Tran whose telephone number is 703-308-1868. The examiner can normally be reached on Wed-Fri. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9310.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

August 8, 2002

Lien Tran
LIEN TRAN
PRIMARY EXAMINER
Group 1703